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In the

Supreme Court of the United States

October Term, 1952

No. ~~658~~ 28

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR,

Petitioner,

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY,

Respondents.

BRIEF OF VIRGINIA ELECTRIC AND POWER COMPANY IN OPPOSITION

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Dated April 23, 1952.

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No. 658

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR,

Petitioner,

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY,

Respondents.

BRIEF OF VIRGINIA ELECTRIC AND POWER COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Court below (V,* 28) is reported at 191 F. (2d) 796. Unreported are the Opinion and Order of the Federal Power Commission (I, 41), the Trial Examiner's decision of March 17, 1950 (III, 1045), and the Supplement thereto of November 15, 1950 (III, 1107).

* The Roman numerals herein refer to Appendix volumes in which portions of the record are printed.

JURISDICTION

If petitioner has sufficient interest to present a litigable case or controversy, and if the Petition is properly filed, the jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act permitting certiorari to Court of Appeals review of Federal Power Commission orders. The decree of the Court of Appeals for the Fourth Circuit, denying the Petition to Set Aside the Commission's order granting the challenged license, was rendered on October 1, 1951 (V, 46). The Petition for Rehearing (V, 47) was denied on November 5, 1951 (V, 64).

QUESTIONS PRESENTED

1. Whether Section 10 of the Flood Control Act of 1944, which approved a general plan for development of the Roanoke River and authorized federal construction of two of the eleven projects in the plan, bars a license otherwise proper under the Federal Power Act for construction of one of the remaining projects.

2. Whether, under Section 7(b) of the Federal Power Act, by which a license is to be withheld when in the judgment of the Commission the United States should undertake the development, the Commission by its 1944 report on the Roanoke River plan has barred a Roanoke Rapids license which Congress by its action in the Flood Control Act of 1944 did not bar.

3. Whether the Secretary of the Interior, by virtue of his function to dispose of surplus power from reservoir projects under the control of the Department of the Army, may litigate the authority of the Federal Power Commission to license a project not under the control of the Department of the Army.

4. Whether the Secretary of the Interior may litigate below or here without appearance for him by an officer of the Department of Justice or an attorney specially appointed by the Attorney General.

STATUTES INVOLVED

Pertinent provisions of the Federal Power Act are set forth in the Petition at pages 69-75, and of the Flood Control Act of 1944 at pages 67-69. Other statutes are referred to in the Petition and below.

STATEMENT

Respondent Virginia Electric and Power Company has been issued a license by the Federal Power Commission, sustained by the Court below, to construct a hydroelectric project of 91,000 kilowatts capacity on the Roanoke River at Roanoke Rapids, North Carolina. Petitioner seeks to recall and bar the license.

Only this Licensee seeks to construct a project at Roanoke Rapids. The United States does not. The Secretary of the Interior does not. The opposing cooperatives in Case No. 659 do not. Petitioners in Cases 658 and 659 seek, solely, entire prohibition of the construction of any power dam at Roanoke Rapids until such future time as Congress may, if ever, be persuaded to bring about Federal Government construction of a power dam at the site.

Congress has established an immense program of prospective works for the control of destructive flood waters (H. R. Rep. No. 969, 81st Cong., 1st Session (1949); III, 1084, 1089). At Roanoke Rapids only electric power is involved. The Commission found (I, 44):

> "The only public benefit to be obtained through development of the Roanoke Rapids site will be through the

generation and distribution of electric power, whether that site is developed by the United States or by some other interest."

The Secretary of the Interior is directed by Section 5 of the Flood Control Act of 1944 to market surplus power from federal dams.

By this litigation, the Secretary of the Interior would keep Roanoke Rapids undeveloped, against the chance that some day Congress might be persuaded to develop federal hydroelectric power at that site for the Secretary to market. That is all the Secretary of the Interior has to do with the case (except for such regulatory interests as that of the Fish and Wild Life Service, whose recommendations have been observed by protective conditions in the license; Ex. 6; I, 72-73).

Having nothing more to do with the case, the Secretary of the Interior has nevertheless successfully paralyzed it in monumental litigation, now in its fourth year. For this, he has taken it upon himself to contest the license upon issue after issue of fact having no conceivable relation to the duties of the Interior Department, including matters administered exclusively by other agencies of Government. He now seeks to come here in the role of *parens patriae* (P., 23-4*) on the disproven claim of fact that the license surrenders to the Company $75,000,000 of Government assets (P, 21, 37, 38, 39, 58).

The Department of Justice has brought no case to protect Government property. It has taken no part in this controversy. The Corps of Engineers, the agency charged with construction and operation of flood control projects, has approved the licensed project (I, 67).

The Secretary of the Interior, alone in Government, has

* The Petition.

pursued this myth of spoliation of Government assets by the license. But that is only one reach of the forensic morass in which the case has been inextricably imbedded.

The nature of this controversy may be seen in some of the areas traversed by the long road leading to the Petition.

Through hundreds of pages of trial the Secretary of the Interior insisted that the project is harmful to navigation—an interest whose protection by the Commission, under Sections 4(e), 11, 12, 18, and 26 of the Federal Power Act, is shared only with the Army Engineers. The Secretary requested this finding (S49 R,* 101):

> "64. The proposed project is a dam which constitutes an obstruction to navigation with no facilities provided to make navigation possible from Weldon upstream through Roanoke Rapids. . . ."

And again (S50B,** 8):

> "Exhibit 8 shows that without any regulation for navigation, the discharges from the Applicant's project (varying from 1,000 cfs to 17,500 cfs) would create surges of as much as 11 feet in one day. Such surges would mean that boats and barges drawing 5 feet of water would at times float on high water and at other times squat on the bottom of the channel. When the boats are at dock or pier, loading or unloading, they will be raised and lowered over a height of 11 feet. It does not require expert testimony to show that such variations in depth would work havoc with navigation."

All the navigational contentions by the Secretary of the Interior were consistently held without merit (III, 1094, 1100, 1104; 1111; 1124-6; I, 45, 47-52).

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* The Secretary's Reply Brief of October, 1949, before the Commission.

** The Secretary's Brief of August, 1950 on the reopened hearing.

Contest by the Secretary of the Interior has gone so far afield as to request the finding (refused) that (S49 R, 101-2):

> "66. The operation of the proposed project as a peaking plant, with consequent great variations in discharges of water, will create a great hazard and may result in loss of life to children and others seeking recreation in the stream below Roanoke Rapids; sudden large discharges may carry off livestock watering in the stream; the minimum releases of 500 cfs will create shallow pools where fish may be taken without the sport of fishing (Br. pp. 101-2)."

The Secretary—not the Army Engineers who construct and operate federal dams in this area—put on trial the effect of this project upon the potential site upstream at Gaston (S49 R, 86).

Then, attacking the whole theory of peaking plants—which utilize the opportunity for daily storage of river flow for daily release at high capacity to meet the intermittent high peak demands upon utility systems—the Secretary of the Interior took to trial his charge that the Licensee's proposed investment of $27,000,000 in the project is "economically absurd" (S49 R, 98) because lesser capital would provide a steam plant which could run continuously. Nothing was said of fuel cost or of the counter-absurdity of generating continuous energy in carrying intermittent peak loads. The Secretary put on trial his understanding that by this project the Licensee must make a *double* investment, one for the hydro plant and one for an extra steam plant. For this the theory seriously propounded was that, when the generating schedule of the hydro plant and of one of the steam plants in the system is re-scheduled, the Licensee must end with an *extra* steam plant which would not otherwise have been con-

structed (S50 B, 27). In the other direction, although raising no question as to the estimates of future load increases (S50 B 174; I, 55) the Secretary contended that by various means the Licensee could meet its loads without adding capacity. Since the highest peak demands are brief—witness the highest 100,000 kilowatts of demand for one hour per week in December (I, 60; III, 1134)—the Secretary said "cut out this peak" (S50 B, 29). That is, disconnect somebody. Or, he said, "make use of the spinning and other reserves" (S50 B, 30)—though elsewhere Interior attacks this Licensee on the score of inadequate reserves (Hearings before the House Sub-committee on Interior Department Appropriations for 1952, 82nd Cong., 1st Sess., p. 88). Or, he said, "overload the 624,000 kw of the existing capacity" (S50 B, 30). Or—get the power from some other system (S50 B, 30-31)!

The Secretary of the Interior then sought to protect the Licensee, itself, and its consumers with the contention that it "would be more economical" to have the Government build Roanoke Rapids and sell the project power to the Licensee (S49 R, 99).

The Secretary made no secret of the nature of this economy. He requested this finding to defeat the license (S49 R, 104):

> "73. The great difference in the excess of benefits over costs and of the benefit-cost ratios as between the Government development and the proposed development by the Applicant is largely due to two factors:
>
> "(a) The cost of money to the United States is approximately 2%, as compared with the estimated 6% to the Applicant.
>
> "(b) In the annual charges of the Applicant's project are included large amounts for Federal and local taxes which constitute operating expenses and which the consumers must pay in their rates. The Govern-

ment does not pay taxes to itself or to the local authorities, and therefore no such charges are passed on to the consumers. (Br. pp. 78-87, 162-4; Rep. Br. pp. 37-48)."

The Secretary did not even shrink from claiming that there is a public benefit in non-payment of taxes from this project. He said (S49 B,* 85):

"... from the standpoint of our political theory, the shifting of the large part of these taxes would be definitely advantageous."

One of the two greatest obstacles to the license, according to the claims placed on trial by the Secretary of the Interior, has been the whole subject of power marketing. The Secretary's main point was that he could, if Roanoke Rapids were a federal development, market all of its power to customers, such as cooperatives, who have a statutory preference to power that the Secretary markets. The evidence explored load estimates, load factors, transmission, marketing policies, power rates, power uses. All these and other aspects of power marketing accounted for a great part of the 2,300 pages of transcript of the 1949 hearing. They formed one of the two issues on which the Secretary obtained reopening of the case and retrial in 1950, to adduce another 1,100 pages of transcript. On all that was said, it was found that the Secretary's preference customer market could not even feasibly absorb all of the power to be generated at the federal dam under construction on the Roanoke River forty miles upstream at Buggs Island,** let alone the power from Roanoke Rapids too (III,1086, 1135; I, 63). The Secretary's market-

* The Secretary's Brief of August, 1949, before the Commission.

** Now named the John H. Kerr Dam and Reservoir. Civil Functions Appropriations Act, 1952, 1951 U.S.C. & A.S. pp. 631, 632. The name Buggs Island is used herein for conformity with the record in this case.

ing witness, the Southeastern Power Administrator, admitted that the market study on the basis of which reopening in 1950 was granted for the marketing issue was merely a "quickie" (I, 63). The Secretary's evidence as to his potential power market was found to be both immaterial to any issue in the case and inadequate (I, 63, 65).

The Secretary would persist here on one aspect of his marketing claims tried below and found against him. The Petition says, in effect, that the Secretary should have Roanoke Rapids power to sell above cost in order to sell Buggs Island power below cost (P, 22). Aside from immateriality to any bar in law, the Secretary's effort to stand here on factual arguments based upon the 1943 estimates of possibly lower power cost at Roanoke Rapids than at Buggs Island is foreclosed by the finding that (III, 1113):

> "The contention that without Roanoke Rapids power to be combined with Buggs Island power the latter would have to be sold to preferred customers at higher rates is highly speculative and unrealistic."

Foremost throughout the contest of this case by the Secretary of the Interior has been his assertion that the license robs the Government of $75,000,000 of power benefits created by the Government's investment at Buggs Island. That is the case the Petition now seeks to make here. It is contradicted by the record and can afford no reviewable question. The Petition does not even ask review of the findings which foreclose it, but simply represents to the Court facts contrary to the findings.

This extravagant characterization of the action by the Commission and by the Court below is a misfit of two thoughts, one misused, the other wrong.

The figure of $75,000,000 is the 1944 estimate of the power benefits which the Government could create at Roa-

noke Rapids if the Government invested in a project at Roanoke Rapids. The figure is the Government cost of developing hydro power at the site, for 50 years, subtracted from the cost of private development of equivalent steam power (J, 158, 162-3). To say that development of the project by the Licensee instead of by the Government takes Government assets is the same as saying that Company operation of a steam plant takes Government assets because coal is a natural resource and because Government operation, tax free and on 2% interest, would be cheaper. It is the same as saying that the farmers of the country daily take huge Government assets, because farming utilizes natural resources, and because Government farming, tax free and on 2% interest, would be cheaper. But whatever the social merits of Government financing as against private financing, potential benefits of a Roanoke Rapids investment are palpably misused in the Petition for the impression that the license surrenders Government assets when the Government has made no investment at Roanoke Rapids and is making none. Under the license the investment at Roanoke Rapids is to be made by the Licensee.

The other face of this false coin which the Petition would use to come here is assertion that Roanoke Rapids is mainly dependent for its value upon the Government's development upstream at Buggs Island. Every aspect of this assertion was tried exhaustively and found wrong. Without request for review of the findings, as there can be none, and without record references, as the record is to the contrary, this naked assertion is nevertheless the central focus of the Petition. Thus the case sought to be reviewed is stated in grand culmination of contradiction of the record as follows:

> "The development of Roanoke Rapids derives its value mainly from the Government's huge reservoir at Buggs Island. It may fairly be stated, as an engineering fact,

that Gaston and Roanoke Rapids are powerhouses of the Buggs Island Reservoir. It is because of the Government's investment in Buggs Island that the net power benefits of *Roanoke Rapids in the comprehensive plan* would be in excess of $75,000,000 over the 50-year period of the license granted to VEPCO." (Italics as in text; P, 37.)

* * *

"It is unjust and unreasonable to surrender the fruits of the Government's investment in Buggs Island to a private power company, rather than distribute the power benefits among the people in the area." (P, 38)

* * *

"The decision of the court operates to surrender the benefits of the Government's investment in upstream developments to private power companies, rather than to distribute such benefits among the people in the area." (P, 58)

Presumably these benefits that the Petition pleads and this dependence on Buggs Island are those that the Secretary sought to establish before the Commission and failed to establish, not something else just conceived and unexplained. What the Secretary sought vainly to establish below was that Roanoke Rapids must depend upon Buggs Island storage for capacity. The value of power generation depends upon two factors, capacity and energy. All agree that average annual energy output at Roanoke Rapids will be increased by Buggs Island. Under existing law, Section 10(f) of the Federal Power Act, the Licensee will be assessed in favor of the Government for this benefit. The project can generate annually 275,000,000 kwhrs on natural flow without Buggs Island (I, 56). Flow regulation by Buggs Island will increase flow at one season, decrease it at another, and save for power generation some spill that might otherwise occur in heavy flow. In result the average annual energy

output will be increased by regulation. The increase, on the estimate of the Commission's Staff, will be up to 33,000,000 kwhrs above the estimated 275,000,000 kwhrs on natural flow (IV, 1389), or possibly a maximum increase of 70,000,000 kwhrs on the Licensee's estimate (IV, 300; I, 56). The Secretary accepts these figures (S51 B, 82, 83). What he claims is dependence for *capacity*. The extra energy has the value only of the cost of operating other plants in the Applicant's system long enough to provide the same quantity of energy. Capacity value is the replacement not of the mere cost of operating other generating facilities but of the capital cost of providing them. The hydro plant is deficient in capacity value only if it can operate at full capacity at a time when that power is needed and can not be supplied from other plants in the system. The Secretary of the Interior claimed, throughout the trial, astronomical contribution by Buggs Island to Roanoke Rapids capacity value, and claimed the Roanoke Rapids capacity to be deficient without that contribution. The Secretary thus summed up his case for Roanoke Rapids dependence upon contribution from Buggs Island (S50 B, 103):

> " . . : The greatest contribution of the Buggs Island project is by way of capacity—as much as 75,000 kw. The availability of this capacity is worth some $1,690,000 per year."

The result from the 1949 trial was this finding by the Examiner (III, 1094):

> ". . . Storage regulation which will be provided by the Buggs Island Reservoir will increase the energy output of the Roanoke Rapids project, but not the capacity."

The issue upon this finding was the second of the two challenges upon which the Secretary of the Interior ob-

tained a second trial of the case in 1950 (III, 1110), adding the better part of another year to obstruction of the development. Again the Secretary insisted that there was deficient capacity, that the requirements upon the plant could be met only if the Licensee had a contract with the Secretary to control the operation of Buggs Island, that if assessed for the capacity benefits the project would be economically infeasible, and that if it were not so assessed the Government would be robbed of benefits created by its investment (III, 1110, 1130). For these attacks, all hinging upon capacity, the Secretary introduced at the 1950 trial immense engineering calculations (Exhibits 79, 80, 81, 87; and see offered Exhibits 79A, 80A, 80B, 81A, 81B, 87A; I, 59). The Commission found that they were all "based upon a common erroneous assumption" (I, 59; III, 1110)—the elementary misconception that operation geared to high flow must be the same in low flow (I, 59-62).

The Commission found (I, 62):

> "It is concluded that the proposed Roanoke Rapids project will be fully dependable to 91,000 kw. on the Applicant's anticipated system load under either natural or anticipated, regulated flow conditions (the latter derived from the Army's Definite Project Report), and that the Applicant's proposed project will not, therefore, receive from the Buggs Island project any increase in dependable capacity."

The economics of the licensed project were shown in specific measure beyond misunderstanding. The day-second-feet of flow available on the lowest natural flow of record is more than ample for capacity requirements (IV, 109, 142-3, 165-7). The power produced on natural flow would cost annually $2,980,000 to produce by steam, and the hydro cost will be $143,000 less (Ex. 28, II, 583). The power produced with regulated flow would cost annually $3,233,000 to produce by

steam, and the hydro cost will be $404,000 less (Ex. 15, II, 582). Buggs Island thus may enhance savings at the project by $261,000 per year. Measuring benefit on the alternative approach of direct valuation of the 70,000,000 kwh of additional energy that Buggs Island may contribute, the Commission found that the benefits may amount to $250,000 per year (I, 56). For such benefit the Licensee is to be assessed.

The findings foreclose the Secretary's claim that Buggs Island contributes annually to Roanoke Rapids $1,762,000 in benefits (S49 R, 29, 98), or $1,955,000 (S50 B, 82, 104, 118-9; S50 E,* 163; S51 B,** 82), or, on different theories, $880,800 (S51 B, 88), or, on still different theories, over $900,000 (S51 R,*** 58).

No more does consistency restrain the Secretary's attack upon the license than does proof. At one stage he contended directly to the contrary of his major claim of capacity deficiency. He has persisted in that claim although he admits the project can generate 275,000,000 kwh of annual energy on natural flow (S51 B, 52, 53). Simultaneously he has contended that the entire capacity of 91,000 kilowatts could be fully dependable for the Licensee with only 27,000,000 kwh of annual energy (S49 B, 55). The objective, there, was to prove that the United States should build the project in order to market nearly all of its energy to preferred customers while still providing full capacity value for the Licensee's load. This is merely one instance in which the Secretary refuted in one breath what he propounded in another, but here he long ago cut the core out of the case he would now lay before this Court.

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* The Secretary's Exceptions, December, 1950, to the findings of the Examiner.

** The Secretary's Brief, July, 1951, before the Court below.

*** The Secretary's Reply Brief, August, 1951, before the Court below.

Inconsistency wells up within the four corners of the Petition. At one point it reverses its focal theory of benefits. Benefits, rather than running downstream from Buggs Island to Roanoke Rapids, are made to work upstream from Roanoke Rapids to Buggs Island. Here the objective is to shore up the Secretary's standing to litigate as to Roanoke Rapids. For this the Petition volunteers the engineering novelty that (P, 21):

> ". . . the power from Roanoke Rapids would serve to firm up the Buggs Island power and render it more salable and more valuable."

To realize the peaking value of both Buggs Island and Roanoke Rapids they must peak on top of peak—*they must operate at the same time.* Only thus can the combined power of the two serve the area peak loads in a magnitude equal to the sum of the capacities of the two projects. On the contrary, if one project *firms* the other, they must operate at different times, one hydro plant supplying energy while the other shuts down to replenish its power pool from the river flow: if they so operate they can not contribute to carrying of the area loads more than the power of only one of the plants. The peaking value of one of the plants is destroyed. The Secretary's theory of permissible operation is foreclosed by the finding that:

> "There seems to be no question that because of its flow pattern which can be predicted with reasonable accuracy from past records, the Roanoke River will produce most economically what is known as low-load-factor power. Thus Buggs Island and Roanoke Rapids energy will be most usable on utility systems which have steam or other capacity to furnish firm energy for base load." (III, 1052-3)
>
> ". . . the Roanoke Rapids project either as proposed by

> the Applicant or as proposed by the Army Engineers would be largely a run-of-river development with pondage suitable only for peaking purposes, . . ." (I, 51)

A last effort to discover dependence of Roanoke Rapids upon Buggs Island was made in the Secretary's Petition and Brief before the Court below (S51 B, 86) and reappears in the cooperatives' petition here in Case No. 659 (p. 8). It urged that as energy alone the Buggs Island contribution should have been valued at several times the $250,000 found by the Commission. The data cited for this afterthought contention include capacity values. The fact is that Petitioner's own engineering witness, contrary to the engineering views of counsel, valued energy at even less than did the Commission (IV, 669).

All this is as far from any issue of a statutory bar as it is from a case of surrender of United States assets. The Petition depicts the problem which it asks this Court to consider as one created by the facts represented in the Petition. The findings here establish the facts to the contrary. The true nature of the case is thus stated by the Court below:

> "It was foreseen, of course, that the building of the flood control projects would benefit power projects lower down the stream, but provision had been made, in section 10(f) of the Federal Power Act, for the Power Commission to assess the value of such benefits against the licensees of the power projects. There would have been no sense in permitting water power to go to waste, when private enterprise was willing to develop it, merely because the government was constructing a flood control reservoir in the river basin and as incidental thereto had approved a general plan of river basin development." (V, 40)

* * *

"The Commission found that the construction of the Roanoke Rapids project by the Power Company, which would use it for peaking purposes in connection with steam generating equipment, was economically feasible and was the construction best adapted to the proper development of the project for power purposes; and we think that this finding is amply supported by the testimony." (V, 43)

* * *

"All of this is being lost so long as the project is not constructed; and its construction, even though by private enterprise, adds just that much to the wealth of the country and the available electrical energy, so greatly needed in this period of national emergency. To permit its construction as provided by the license, will surrender no public assets to anyone but will merely permit the Power Company to develop the property which it has already acquired for power purposes and thus utilize a source of power now being wasted." (V, 46).

No further consideration need be given below to the imaginary case stated by the Petition.

ARGUMENT

I.

The Decision Below is Clearly Correct.

A.

SECTION 10 OF THE FLOOD CONTROL ACT OF 1944 IS NO BAR TO THE LICENSE.

1. *It is clear on the face of the statute that it creates no bar to the license.*

Where Congress has desired to stay the Commission's hand and bar any license for development of specific waters, Congress has said so. Congress so directed as to the Colo-

rado River by the Boulder Canyon Project Act, 45 Stat. 1051, 1062; as to the Great Falls of the Potomac River by Act of May 29, 1928, 45 Stat. 1012; and as to National monuments or parks, by Act of March 3, 1921, 41 Stat. 1353. There is no such provision as to the Roanoke River in the Flood Control Act of 1944 or in any other law.

There is no claim that there is any express statutory prohibition of the license.

The Petition seeks, but cannot find, an implied bar to the license in the action taken by Congress in connection with the Roanoke River in the following provisions of § 10 of the Flood Control Act of 1944:

> "Sec. 10. That the following works of improvement * * * are hereby adopted and authorized * * * to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated * * *:
>
> * * *
>
> *"Roanoke River Basin*
>
> *"The general plan* for the comprehensive development of the Roanoke River Basin * * * recommended by the Chief of Engineers in House Document numbered 650 * * * *is approved* and *the construction of* the *Buggs Island* Reservoir * * * *and* the *Philpott* Reservoir * * * *are hereby authorized* * * * at an estimated cost of $36,140,000.
>
> * * *"

The numerous sub-paragraphs of § 10 set forth authorizations of numerous projects in the rivers of the nation. The Roanoke River sub-paragraph "approved" a "general plan" for the river, as set forth in House Document 650. That Army Engineers' report concluded that optimum development of the river would be achieved by eleven reservoir

projects. Three of them—Buggs Island, Philpott, and Smith Mountain—were reported to provide substantial flood control benefits (I, 158; III, 1070). One—Stuart—was assigned negligible flood control benefit but is treated by the Army Engineers as a power dam (III, 1069). The remaining seven —Gaston, Roanoke Rapids, Leesville, Taber, Melrose, Randolph, Schoolfield—are "straight power projects" (I, 158; III, 1070). Congress "authorized" in the Roanoke River subparagraph "the construction of" only Buggs Island and Philpott, which provide nearly all of the flood control benefits obtainable (I, 176).

These two Roanoke River projects which Congress authorized are thus in the terms of the statute the projects, and the only projects, which in the Roanoke River Basin are the "works of improvement" referred to in the opening paragraph of the section as "hereby adopted and authorized." The terms of the statute do not permit a reading that all eleven Roanoke River projects were "works of improvement" thereby "adopted and authorized"—when Congress said that there were two Roanoke River projects which were "authorized", the named projects at Buggs Island and Philpott.

Yet this misreading of the statute, which its terms do not permit, and the claim to which can warrant no review, is ultimately all that the Petition, stripped of its contradiction of the record, can ask to be reviewed.

The Petition would weave an intricate web of illusion that this Court should clarify the process of federal decision upon flood control project construction (P, 3, 6, 25-27, 29, 31-36, 40-41, 48), but all the diffuse strands of reasoning end in the central misreading of the Act claiming that eleven dams were authorized in the Roanoke River when the Act said only two. The Petition thus epitomizes its misreading of the statute (P, 31):

> "Among 'the following works of improvement' listed in that section is 'the general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document numbered 650, Seventy-Eighth Congress, 2d session.' "

And again (P, 48):

> ". . . the entire river basin development has been 'adopted and authorized.' "

The Petition can reach this result only by contradiction of the Act.

What petitioner thus wishes Congress had done in the case of the Roanoke River Congress has done by express direction in the case of other river basins. In such cases Congress has directed in the river basin sub-paragraphs that what Congress authorized was prosecution of the entire river plan itself, whereas here it directed authorization of only two named projects in the river plan. An illustration is the White River Basin sub-paragraph providing:

> "In addition to previous authorizations, there is hereby *authorized to be appropriated the sum of $45,000,000 for the prosecution of the comprehensive plan* approved in the Act of June 28, 1938, as modified by the Act approved August 18, 1941, for the White River Basin." (Italics supplied)

As the Court below said of such express authorizations of entire plans (V, 34):

> "When Congress intended to authorize the construction of an entire comprehensive plan of river development, it did so in no uncertain terms."

The umbrella coverage which petitioner would give the "works of improvement" authorization in the opening paragraph, so as to override the directions in the river basin sub-paragraphs, would not only contradict the Roanoke River provision, but would end in sharp conflict with other detailed directions in the sub-paragraphs. Thus, where for the Connecticut River Basin the Act extended, in the terms of that basin sub-paragraph, authorization for prosecution of the general plan itself, it carved out certain exceptions. Among them was the provision that:

> ". . . *Provided further*, That neither this authorization nor any previous authorization shall be construed to authorize the construction of a dam or reservoir at the Sugar Hill site on the Ammonoosuc River."

The Petition here, which depends upon first paragraph authorization of every basin plan mentioned in the sub-paragraphs, would authorize Sugar Hill, whereas Congress said that it is not authorized. The only way the statute can be read for authorizations is to read within the sub-paragraphs what projects were the authorized works of improvement. In the Roanoke River they are solely Buggs Island and Philpott.

That the extent of authorization is focused within the terms of the river basin sub-paragraphs is exemplified by the action of Congress subsequent to the 1944 Act. In the 81st Congress, bills, H. R. 3250 and H. R. 3416, were introduced to extend authorization to a third Roanoke River project, that at Smith Mountain, the last to provide any substantial flood control benefits (I, 158). Hearings on the request were held by the House Committee on Public Works (its Hearings on H. R. 5472, 81st Cong., pp. 136 et seq.). The authorization was not granted. The Flood Control Act of 1950 contains no further Roanoke River authorization.

The Savannah River affords a further example. The 1944 Act contains a Savannah River sub-paragraph which is identical in form with the Roanoke River sub-paragraph. It "approved" the "general plan" and "authorized" one project, that at Clark Hill. In the same Committee hearings which heard the request for additional Roanoke River authorization to authorize Smith Mountain, a request (H. R. 2283, 81st Cong.) was heard for additional Savannah River authorization to authorize Hartwell (the Hearings, supra, pp. 37 et seq.). Favorable action was taken on the Hartwell request. For this purpose the bill was first reported out of Committee with authorization "for the construction of projects in the general plan." This language was amended on the floor to read as authorization only "for construction of the Hartwell project in the general plan" (H. R. 5472, 81st Cong.). Chairman Whittington explained that the change "was a clarifying amendment to make certain and definite that this authorization just refers to that project and no other" (95 Cong. Record 11975; House Committee Report 969, 81st Cong. pp. 88-89). In this form this additional Savannah River authorization was enacted in the Flood Control Act of 1950.

The Petition in this case would have this Court declare that Smith Mountain and all the other projects in the Roanoke River plan, and similarly Hartwell and all the other projects in the Savannah River plan, had already been authorized originally in the Flood Control Act of 1944. There would be little good in Congress using words at all if under the guise of interpretation they were to be thus supplanted.

Searching every vapor, however, the Petition, would infuse here distinction between project authorization, said to cover the whole river under the opening paragraph, and appropriation authorization, said to be all that the sub-paragraph granted to Buggs Island and to Philpott which

was not granted the other nine projects (P, 26, 27, 36). It is said that the other nine projects were part of the "reservoir of useful and worthy public works for the post-war construction program" referred to in the opening paragraph of § 10, and that as such they were authorized but postponed, whereas Buggs Island and Philpott were authorized for immediate construction by the sub-paragraph (P, 6, 34). The distinction dies in its utterance. What the sub-paragraph in terms granted to Buggs Island and Philpott was not merely authorization for appropriation, which was conveyed by the estimate of cost, but authorization "for construction", which was express. That decision to construct which was thus made for the two named projects is the decision which was withheld for all the rest. Buggs Island and Philpott were the reservoirs of post-war public works in the Roanoke River whose construction was deferred. House Document 650 shows that the Secretary of War in transmitting the report to Congress informed it that *none* of the projects were "essential to the war effort" and that *all* authorized construction "should be deferred until after the war" (IV, 26).

Absent decision to construct any but two named Roanoke River projects, no others have project authorization. The significance of project authorization in flood control legislation is the legislative decision to construct. That is the purpose of authorization. Until the Project is authorized, request for appropriation will not be considered by an appropriation committee. Inclusion of an item for an unauthorized project in an appropriation bill is subject to a point of order. House Rule XXI, H. D. 739, 81st Cong., 2d Sess.; Senate Manual, Standing Rules of the Senate, Rule XVI, Senate Document No. 5, 82d Cong., 1st Sess. See the explanation in the Senate Committee Report of April 23, 1948, on the Civil Functions Appropriation Bill of 1949, in which re-

quested appropriations for unauthorized projects were referred back to "be considered by the proper legislative committees" (Senate Report 1167, pp. 6-7, 80th Cong., 2d Sess.). Absent any legislative decision to construct Roanoke Rapids, the distinction sought by the Petition does not help the Petition but defeats it.

The Petition seeks something to review (P, 30-31) by reason of the survey provisions of the 1936 and 1938 Flood Control Acts providing:

> "*And provided further*, That the Government shall not be deemed to have entered upon any project for the improvement of any waterway mentioned in this Act until the project for the proposed work shall have been adopted by law:"

A like provision is repeated in § 11 of the 1944 Act directing further surveys. This caveat serves to confine authorizations, not to expand them. It does not help the Petition raise a question but further manifests that there is none. Roanoke Rapids can not be a project "adopted" under the opening paragraph of § 10 of the 1944 Act unless it is equally governed by the accompanying word "authorized" in that paragraph. The Roanoke River provisions foreclose any question whether Roanoke Rapids was one of the works of improvement authorized by the section, hence it can not be one of the public works referred to as "hereby adopted and authorized."

In sum, the license here is not one for development of a site at which Congress has decided to construct a federal dam. The Commission refused to grant a license in such a case. *In the Matter of Savannah River Electric Company*, 6 F. P. C. 317 (1947). The same Court that here has upheld this license upheld the Commission's refusal of a license there. *Savannah River Electric Company* v. *F. P. C.*, 178 F. (2d) 408 (4th

Cir., 1947). There the applicant sought a license to construct a dam at Clark Hill on the Savannah River. It was refused because in the 1944 Act Congress had made the decision to construct a federal dam at that site and construction was in fact in progress. The Petition seeks to read into the 1944 Act the same decision by Congress as to Roanoke Rapids. It is not there. The 1944 Act on its face affords no reviewable question.

2. *The action of Congress in refraining from making any decision to construct a Roanoke Rapids project was no verbal accident but was deliberate.*

In the hearings on the 1944 Flood Control Bill before the Senate Sub-committee on Commerce, the extent of authorization in the Roanoke River was particularly discussed, considered, and explained. The spokesman for the Army Engineers, Col. Goethals, was asked by Senator Overton whether Buggs Island and Philpott were the only Roanoke River projects for which authorization was requested. Col. Goethals stated (Hearings on H. R. 4485, Sen. Comm. on Commerce, p. 24):

> "Col. Goethals—*Those are the only two recommended to be authorized in this bill. The report recommends that Congress approve the general plan of development, but at this time authorize only those two reservoirs in the amounts stated.*" (Italics supplied)

Mr. Whittington, Chairman of the House Committee on Flood Control, in his explanation on the floor of the House when the 1944 bill was under consideration, particularly emphasized exclusion of projects by which the Government would become competitor of the electric industry. The Petition now seeks to write into the Act, by interpretation, the undertaking by Government to compete with industry which

was deliberately excluded. The Chairman stated (90 Cong. Rec. 4122, 4199):

> "Many projects have been proposed under the guise of public works, but every proposal should be studied and tested. *They should meet the requirements of sound public works.* First, the project should have practical utility: Second, it should be economically sound. *Third, it should be of the type that cannot compete with any facilities that can be provided through private enterprise.* Federal public works should not conflict with private works and local public works . . ."
>
> ". . . *no power project is authorized in the bill.*"
>
> (Italics supplied)

The deliberacy of Congressional decision to construct projects expressly authorized, and to withhold that decision as to projects not expressly authorized, is shown conclusively in the action as to Smith Mountain and Hartwell described above.

The view of the 1944 Act continuously entertained by the Army Engineers, the agency charged both with recommendation of flood control projects to Congressional Committees and with construction and operation of the projects is certainly informative of the scope of the flood control program. The following is found in the Report of the Hearing on the Flood Control Act of 1950 before the House Committee on Public Works (Hearings on H. R. 5472 (Title 2) 81st Cong., 1st Sess., pp. 143, 144):

> "Colonel Gee: We would be remiss in our duty as engineers serving the Congress if we did not point out to you the potentialities of the Roanoke River Basin. We have said in the report that the building of 3 of these 11 projects will produce all of that flood control which we believe to be economically justified, that the remaining 8 are straight power projects, and if it

desired that power projects be built by the Federal Government, we believe these are the sites best adapted to that purpose, and this is approximately what it will cost to develop the full capabilities of that river basin.

* * *

"'Mr. Angell: Is the Federal Government at the present time planning to develop any of those dams on the lower part of the river which are devoted exclusively to power production?

"'Colonel Gee: No, sir. They have the same status in this basin plan as the eight remaining projects. They are part of the approved plan. Their being in that plan certainly is no bar to a private utility company coming in and seeking to develop one of these projects.

"'Mr. Angell: And that is what is being done now?

"'Colonel Gee: That is being done now at Roanoke Rapids, sir.'"

3. *The plea in the Petition to find the terms of the approved Roanoke River plan to be a bar to licensed development of the projects which were not authorized for federal construction seeks legislation and not adjudication.*

An impassioned political appeal is evolved by the Petition from the use of ratios and economic analysis in House Document 650, on which the Petition brands the license a "withdrawal" of "58,800 kw of capacity" from the plan, a "reduction of the feasibility ratio", a dismemberment by which "the United States would be deprived of over $62,500,000 of net power benefits" (pp. 9, 21-22, 39, 43, 51, 52, 56, 57). When there is disentangled from this web the false strand of asserted dependence of these economics upon the government's investment at Buggs Island (ante, pages 9-17), the values cited may be seen for what they are as measures only of what may be created at Roanoke Rapids if it is developed.

This Court has adverted to the part played by the Federal Power Act, legislation which culminated decades of controversy, in establishing comprehensive river basin planning. *First Iowa Hydroelectric Cooperative* v. *Federal Power Commission*, 328 U. S. 152, 180-1 (1946). As the Court there said:

> "It was a major undertaking involving a major change of national policy. That it was the intention of Congress to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act * * *."

Since passage of the Act in 1920, project development under Commission license has required best adaptation to a comprehensive plan (Section 10(a)).

Flood control projects have also been systematically adapted to comprehensive plans since the Flood Control Act of 1936. The first prominent step was taken in the Act of March 3, 1925, 43 Stat. 1186, 1190, directing the Secretary of War and the Federal Power Commission to report the cost of carrying out comprehensive surveys of rivers on which such surveys should be undertaken, and to report the purposes for which improvements should be proposed. The report so made, the well known House Document No. 308, 69th Cong., 1st Sess., considered "all navigable streams upon which power developments appear to be feasible". It stated that such comprehensive surveys would be useful for both public and private development, and "to insure that waterway developments by private enterprise would fit into a general plan for the full utilization of the water resources of a stream." This report was enacted into law by the River and Harbor Act of January 21, 1927, 44 Stat. 1010. The Act authorized surveys thereafter to be made "in accordance with House Doc-

ument 308 * * *." Comprehensive plans have been so prepared by the Army Engineers in close collaboration with the Federal Power Commission, under that directive, and thus in their very genesis such surveys have been articulated as guides for either federal or non-federal development. House Document 650 reporting upon the Roanoke River is such a survey, carried out under authority of the 1936 Flood Control Act which directed the Army Engineers "to continue" the surveys of the Roanoke River inaugurated under House Document 308. The Examiner in this case clearly expressed the resulting effect of the Roanoke River planning in the following:

> "House Document No. 650 is really in substance a revised '308 report' for the Roanoke River Basin and the 'approval' of Congress of the plan contained in it is no more than an expression by that body to the effect that the development of the basin whether by the United States, by private business, or by both, must be along certain general lines." (III, 1075)

The Petition seeks to alchemize the river into a federal preserve because the plan uses federal construction cost-to-benefit ratios. Such ratios are merely estimated annual benefits that may be created by a project, divided by estimated annual costs of the project. Power benefits are taken as the estimated cost of equivalent privately financed steam power. Such ratios are used solely to determine the nature and location of the projects best suited to the river, and to provide Congress with an economic analysis of each project for its decision whether to select any project for federal construction. The Roanoke River plan determined that Buggs Island and Philpott should develop substantial flood control benefits and Congress decided to construct them. The plan determined that at Roanoke Rapids the project best

suited to the river is purely a power project; the head there should be fully developed, and the feasible upstream power site at Gaston should be protected. Nowhere in this process does planning become federalization except where there is the decision to construct, which there was not as to Roanoke Rapids.

To suppose that ratio analysis of projects which Congress did not decide to construct federalizes them for the future is to suppose that Congress expected to freeze economic ratios by statute. The Roanoke River shows the entire unreality of this supposition. The 1944 Buggs Island cost estimate of $31,490,000 (I, 158) has increased to over $78,000,000 (I, 317-8), and the 1944 estimate of its annual benefits at $207,000 for flood control and $1,758,900 for power (I, 158) has been transformed to $535,000 for flood control and $3,762,000 for power (I, 317-8).

More fundamentally, this notion of federalization by ratios distorts river appraisal into river seizure. What the Army Engineers said in H. D. 650 as to their estimate of potential electric power is simply this (I, 162):

> "170. *Water-power value.*—The annual value of the potential water power available has been established, for the purpose of this report, as the cost of an equivalent supply of power developed by a new steam plant of modern design located at a favorable site in or near the Roanoke River Basin to supply an inter-connected power system. . . . Annual charges, on a privately financed basis, were taken . . ." (I, 163)

The potential power benefits estimated in the survey are not dollars which, in case of federal construction, the Government collects into the Treasury. Spokesmen for both Interior and the Commission in this case agreed in this explanation, because under Section 5 of the Act, the Government

collects no more than the power costs (IV, 190, 197, 201). The power benefits are simply an estimate of the value of power that may be created by development. Those benefits will be created for the service of the public under the license.

The Petition would defeat the plan in distorting the license into a "withdrawal" from the plan (P, 9, 21, 22, 51, 52). Development under the license will take a major step forward in carrying out the plan, bringing about, in accordance with the plan, the harnessing of the wasting waters at Roanoke Rapids to serve the electric power needs of the area. The cost difference between federal and private financing of the project, arising from payment of taxes and the use of private credit relieving the burden upon public credit, are as much benefits from power development under the license as the savings of those costs would be under federal financing.

Petitioner may labor without limit to persuade Congress to make the political decision that tax-free Government financing of natural resources development, or of any other industry, should supplant private financing, but petitioner can bring before this Court no Act of Congress laying down a rule of preference for federal financing of hydroelectric development, or legislating Army Engineers analysis by use of ratios into a prohibition of non-federal development of water power. The Court below correctly ruled upon Petitioner's ratio contentions that (V, 42):

> "This argument, however, goes not to the power of the Commission, but to the wisdom of its exercise of power; since it is for the Commission to say, where Congress has not already authorized the construction of a project, whether it should be licensed for private development or recommended to Congress for governmental construction."

Were there any sound reason to consider that there is

danger in leaving in the hands of the Commission the licensing of developments downstream from Government developments, because of any alleged possibility of private industry deriving improper profit from the Government's investment, that viewpoint is for Congress to consider in the future. Its provision for such a case under existing law is that downstream projects may be licensed and shall be assessed for any benefit.

Likewise purely for future legislative consideration is any notion that desirability of a basin site should pre-empt it for exclusively federal development and bar it to non-federal development. Such a concept is wholly repugnant to the Federal Power Act which requires site desirability for proper planning. In the regulation of electric utilities, profits are not controlled by substituting Government operation when industry applies for a license to develop an economically feasible hydroelectric project. They are controlled by regulation of rates (Sections 19, 20), and by regulation of project capitalization and depreciation (Sections 4(b), 10(d), 14).

When disproven fact is stripped from the Petition, the entire case is revealed as resting on a theory that would give to the express decision by Congress to build only two of the eleven dams described in the approved Roanoke River plan the effect of a decision to build all the other nine. Only by such rewriting of the statute would it bar a license for any of the nine.

The resulting law that the Petitioner would write into the 1944 Act is judicial legislation of a legal vacuum for the Roanoke River. All further non-federal development of the River—State, cooperative, or private—would be prohibited, with no further federal development in sight. The statute would fall with a heavy hand, immobilizing all further development of the water resources. The Petition would legislate

the Roanoke River into a deep freeze. It shall stand apart in a reserve, so that ultimately the Federal Government may develop uses of its waters, or it may not, but no other shall. Project lands may be bought and may be owned, as this Licensee has long since bought and now owns these (III, 1053), but the waters shall be untouched: they shall continue to be wasted daily to the sea.

No such prohibition of development of the Roanoke River can be found.

The keynote of the public interest struck by the Petition in invocation of the Report of the President's Water Resources Policy Commission (P, 38) manifests the purely legislative appeal the Petition makes. That report recognized that the policies it advocated were recommended law, not existing law. The Report closes with the ultimate message (p. 303):

"It is for Congress to decide what should be done."

That decision the Petition can not ask here.

B.

The license is not barred under Section 7(b) of the Federal Power Act by the Commission's 1944 report on the Roanoke River plan.

The fortuitous interregnum in which the Petition would here suspend the Commission's authority over the navigable waters of the Roanoke River under Section 7(b) of the Federal Power Act adds nothing to the Petition's groundless assertions under Section 10 of the Flood Control Act of 1944. What Congress did not bar by its action as to the Roanoke River, the Commission has not barred by its own hand in making its 1944 report which was before the Congress at the time of the 1944 Act.

Whatever assumption be made as to the Commission's judgment in 1944, no reason can be given to read Section 7(b) as a rule that, if the Commission once entertains a judgment in favor of the United States undertaking a development, the Commission's licensing authority is forever thereafter abrogated, regardless that Congress does not thereupon so act as to bar a license, and regardless how many years may pass or what changed conditions may supervene. What the section plainly directs is that if, when a license is applied for, the Commission finds Government development preferable it shall withhold the license.

The Commission determined in this case that it did not in its letter of May 3, 1944, entertain, and does not in this case entertain, such a judgment as under Section 7(b) would bar a license (I, 68). Manifestly Section 7(b) affords no reviewable question.

C.

THE SECRETARY OF THE INTERIOR MAY NOT REPRESENT THE UNITED STATES TO CHALLENGE IN THE COURTS THE AUTHORITY OF THE COMMISSION TO GRANT THE LICENSE.

Because on the merits the decision below is clearly correct, there is no need to reach the question as to the standing of the Secretary of the Interior to litigate. Whether or not the bare power to litigate exists, the Court should deny review when no greater interest is represented in the challenge of the Commission's authority than is claimed by the Secretary.

The only source of interest in the Secretary is the direction in Section 5 of the Flood Control Act of 1944 that he shall dispose of surplus power from "reservoir projects under the control of the Department of the Army."

There must be—license or no license—some further Act

of Congress before there is or ever could be or will be federal power at Roanoke Rapids. Decision that the Secretary has no interest does not, as the Petition claims (P, 24), beg the question as to the 1944 Act. A further Act is prerequisite. In whatever way that prerequisite may be characterized—authorization or appropriation or both—the Secretary of the Interior has never had and can never have the function to market Roanoke Rapids power without the action by Congress to create it which Congress has never taken. The Court should not hear litigation brought on behalf of an interest which is not an interest now but only might or might not be an interest in the future under future legislation which might or might not be enacted.

Protection of the general interest of the United States for challenge of the Commission's authority to act in the case and representation of the United States for litigation of such an issue—and that is the issue the Petition seeks to raise—should lie exclusively in the Department of Justice.

The importance, stressed in the Petition, of the Secretary's making of investigations and preparation of reports to advise Congress (P, 15) has no bearing upon judicial controversy. Nor has the Secretary's power market planning any bearing here.* Nor is there any relevance as to Roanoke Rapids power, which the Secretary has not been called upon to market, in what the Petition has to say about the importance of the Secretary competing with the Licensee to oppose

* Marketing was said to have begun for Buggs Island in 1949. The project was then under construction. In fact, the Secretary consented to undertake negotiation of a wheeling contract with this Licensee for disposition of Buggs Island power only in 1951. A contract was substantially negotiated by November 1951 that has never been signed by the Secretary. (See Hearings before the House Sub-committee on Interior Department Appropriations, 1953, 82nd Cong., 2nd Sess., pp. 1053-4).

monopoly by the Licensee (P, 17-20).* All these political pleas that the Secretary be entrusted by Congress with more electric power with which to be competitive with the Licensee are for Congress.

D.

THE SECRETARY OF THE INTERIOR HAS NO AUTHORITY TO LITIGATE FOR THE UNITED STATES THROUGH COUNSEL NOT AN OFFICER OF THE DEPARTMENT OF JUSTICE OR AN ATTORNEY SPECIALLY APPOINTED BY THE ATTORNEY GENERAL:

The Petitions below and here have been filed under the name of only (I, 32; P, 58):

"GREGORY HANKIN,
Counsel for Petitioner, the United States of America, on the relation of Oscar L. Chapman, Secretary of the Interior."

The Solicitor General signed a statement, below and here, that he authorized the Secretary to proceed through his own counsel (S51 R, 67; P, 58). We believe the authorization must be given by statute. The point was made before the Court below but not passed upon. We think it should be called to this Court's attention.

This is not a case of an agency with special statutory authority to litigate through its own counsel, as is the case with the Federal Power Commission (Federal Power Act, Section 314(c)). Nor is it a case of statutory right of intervention lodged specifically in the Secretary of the Interior him-

* In fact Congress has consistently rejected all of the Secretary's requests, based upon these arguments, for Roanoke River Basin transmission line appropriations. See Interior Department Appropriation Act, 1952, U. S. Code Cong. Serv. 1951, p. 241; Report of the House Committee on Interior Department Appropriations, 1953, 82nd Cong., 2nd Sess., p. 2.

self as in certain Indian matters. 25 U. S. C. § 505. The statutes applicable here are the general provisions for conduct of cases in which the United States is interested.* We believe the controlling provisions are:

"(a) Except as otherwise provided by law, it shall be the duty of each United States attorney, within his district, to:

. . . .

"(2) Prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned. . . ." (28 U. S. C. § 507)

* * *

"The officers of the Department of Justice, under the direction of the Attorney General, . . . shall, on behalf of the United States, . . . conduct, prosecute, or defend all suits and proceedings in the Supreme Court . . . in which the United States, or any officer thereof, as such officer, is a party or may be interested. . . ." (5 U. S. C. § 306)

* * *

"Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits . . . in the Supreme Court . . . in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so." (5 U. S. C. § 309)

* * *

"The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the

* These, and the statutes governing employment in Government Departments, are printed in the Appendix hereto.

> Attorney General, conduct any kind of legal proceeding, civil or criminal, . . . which district attorneys may be by law authorized to conduct . . ." (5 U. S. C. § 310)

We have found no decision at variance with the application of these statutes by the Circuit Court of Appeals for the Second Circuit in *Sutherland* v. *International Insurance Company of New York*, 43 F. (2d) 969 (2d Cir., 1930), certiorari denied, 282 U. S. 890. There the Court dismissed a case brought by the World War I Alien Property Custodian by his own counsel, on the ground that, without special agency authority conferred by statute, litigation for the federal government must be brought by the Attorney General or an officer of the Department of Justice. The same court on a like point required special statutory authorization in *S. E. C.* v. *Robert Collier & Co., Inc.*, 76 F. (2d) 939 (2d Cir., 1935). For a review of numerous decisions in the lower courts holding that these statutes must be complied with strictly to implead the United States, see *U. S.* v. *1960 Acres of Land*, 54 F. S. 867, 868, 872 (D. Ct., Calif. 1944).

No petition has been filed below or here by an officer of the Department of Justice.

II.

There is no Conflict of Decision.

The Petition's claim that there is conflict of decision is merest color. There is none.

The Petition suggests, as possible conflict, failure by the Court below to recognize the right of the United States to be heard (P, 24). The decision distinctly abstained from decision that the United States has no standing to sue (V, 31-2). The lack of standing determined below is the absence of any pertinent interest of the United States confided to the protection of the Secretary of the Interior (V, 31-2).

The formal argument in the Petition that the decision below is in conflict with cited decisions of this Court expressing basic rules of statutory construction (pp. 30, 32-38, 40, 44) has no basis. The cited rules of construction permit no decision other than that reached below.

III.

There are Strong Reasons for the Court in Its Discretion to Deny Certiorari.

A.

IT IS NOT IMPORTANT THAT THE QUESTIONS RAISED BE REVIEWED AND DECIDED BY THIS COURT BECAUSE THEY ARE ALL QUESTIONS WHICH CONGRESS ITSELF WILL CONTINUE TO DECIDE IN ITS CONTINUOUS DIRECTION OF ITS FLOOD CONTROL PROGRAM, WHATEVER THE DECISION IN THIS CASE, BELOW OR HERE.

It is manifest that this case is wholly unlike one requiring determination of accrued rights or obligations. All the issues here concern, in the end, what course Congress shall desire its flood control program to take. Congress is continuously making that decision by its successive flood control acts, beginning with the Act of 1936, and continuing with the Acts of 1938, 1941, 1944, 1946, 1948, and 1950.

It must be assumed that Congress will properly observe the limits of the Constitution in the direction of this program. The Court could not decide here, with the finality of a necessary decision, the question whether Congress has the constitutional power to pre-empt a purely hydroelectric site such as Roanoke Rapids for the general purpose of competition with the electric power industry. *Aschwander* v. *United States*, 297 U. S. 288, 340 (1935). That issue would need to be settled only if Congress should unmistakably declare that intention.

The decision of the Court below will continue to be a true interpretation of the direction that Congress desires its flood control program to take only so long as Congress wishes that to be so. An interpretation by this Court would remain the decision of Congress as to its flood control program only so long as Congress should decide it shall be so.

Even as to the Roanoke Rapids site itself, whatever the decision below or here, the issue of federal or non-federal development will remain with Congress. If Congress wishes development of the Roanoke Rapids site to be carried out by this Licensee, Congress may leave in effect the decision below or the same decision here, or may overturn a contrary decision here. On the other hand, if Congress wishes to take over the development for the federal government, Congress can do so assuming it does so for constitutional reasons. It can do so at any time now or in the future, whether the decision below is left unreviewed or is affirmed. It can take over the project by condemnation under the existing provisions of law in § 16 of the Federal Power Act, or can take it over with further legislation if desired. No difference in cost to the federal government is involved other than the entirely problematic difference between the cost of federal construction, at the time of federal construction, and the cost of acquiring the Licensee's investment. If Congress should take over now it would acquire the site before investment by the Licensee in a constructed project. If it should take over in the future, there would be a constructed hydroelectric project to acquire. If the license were barred, there would be nothing to take but empty lands and a river flow long wasted.

The effect of this case upon basin development of the remainder of the Roanoke River will be only such as Congress may decide. This Licensee has now pending before the Commission an application for a license to develop a hydroelectric project at the Gaston site, upstream from Roanoke Rapids.

Under existing law the Commission will of course hear and determine whether in its judgment it should recommend to Congress that the project be developed by the United States instead of granting a license. If Congress wishes the site for federal development it need not wait the judgment of the Commission.

The Petition cries alarm that the decision below "jeopardizes all river basin developments that have been approved by Congress by making their realization contingent upon the non-issuance of licenses by the Commission" (P, 56). Here again is only an issue for Congress to direct as it may wish.

So also petitioner's urgent prayer for greater authority than recognized below, in performing his function of marketing hydroelectric power from federal projects, would bring here only issues that will lie always in the hand of Congress.

B.

THE DELAY THAT WOULD BE IMPOSED BY FURTHER LITIGATION IN THIS CASE IS INJURIOUS TO THE PUBLIC INTEREST AND DAMAGING TO THE LICENSEE.

During all the years since this case began in October, 1948, there has been no greater outcry of "power shortage", nationally and in the southeast, than from the Department of the Interior.* Yet opposition by the Secretary of the Interior in this case has for years paralyzed the effort to add this 91,000 kilowatts of hydroelectric generating capacity to the resources of the area. Had the case been left to orderly determination by the Commission to which Congress entrusted the determination, there is no reason why its decision,

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*Hearings, House Subcommittee, Interior Dept. Appropn., 1952, 82d Cong., 1st Sess., p. 88; III, 1121-2.

with the full benefit of all information and views of other government agencies, could not have been reached by 1949, and the plant could by now be nearing completion.

Continuing load increase during the long pendency of this case has already compelled successive substitution of steam generating units in place of this hydro project in the construction schedule which the Licensee must maintain to provide capacity to meet the increased loads when they are reached. This substitution has already made certain that loss of the hydro benefits will accrue for a period corresponding to the delay. On the Commission's findings, the rate of loss will be over $400,000 per year—in whatever way those benefits would be divided between reduction of the Licensee's power cost and payment to the Government for Buggs Island benefits. Already the substitution compelled by delay has made necessary a use of natural resources in consumption of coal instead of use of water power, shown by the evidence to be at the rate of $1,500,000 of coal per year (II, 582). Already this compulsion to provide steam in place of hydro has created the far greater demand imposed by steam generating facilities than by hydro upon critical materials, such as high temperature alloy steels, upon manufacturer's space, upon labor for manufacture, and upon future labor for operation. All these, for steam power, far exceed the needs for hydro power. Further delay in the licensed construction may repeat this circle by again compelling substitution of steam capacity in the construction schedule. Delay should go no further.

What Congress has not desired to construct, the Licensee should no longer be arrested in constructing.

C.

PETITIONER'S CONTEST OF THE LICENSE HAS GONE BEYOND ALL REASON AND SHOULD GO NO FURTHER.

Had clarification of the Flood Control Act of 1944 by this Court been of importance in this case to petitioner, the case could long since have been matured for presentation here. The contest has not been a campaign to protect a principle, but one of complete obstruction. Petitioner has had his say before Court and Commission through motions, petitions, and briefs aggregating over 1,100 pages. It should be enough. No Commissioner or Judge has found merit in any of them.

When, not satisfied with the length and breadth of the 1949 trial whose issues are illustrated in the Statement above, petitioner obtained a 1950 retrial, the Examiner thus summed up the results of the additional thousand pages of transcript (III, 1109):

> "Little, if anything, in the way of basic facts, was added to the record by the hearing held this year."

Throughout the proceedings in this case petitioner has asked and obtained, repeatedly, extensions of time of weeks and months. These requests are tabulated in the Licensee's Objection in the Court below to petitioner's request there for continuance (V, 5-6). No other party in the case, except in adjustment of conflicts of dates, has asked any extension of time at any stage of the proceeding.

In the Court below, petitioner at once sought a continuance and enlargement of time to write his brief (V, 2). After the decision, petitioner did not seek to come directly here but returned to the Court below to ask rehearing (V, 47). Then the first step here was to obtain an extension of time for filing. This was said necessary because of the Solicitor Gen-

eral's dilemma between two government agencies, which was resolved, however, by the same position taken for the Petition below, which was to leave the Secretary of the Interior to act alone without appearance for him by the Department of Justice (S51 R, 67; petitioner's application to this Court for extension of time, pp. 4-5).

As long ago as November 15, 1950, the Commission's Chief Presiding Examiner said in his Supplement of that date to his initial Decision of March 17, 1950, as follows (V, p. 7):

> "The completed application for license to construct the power plant and dam at Roanoke Rapids was filed April 6, 1949. The contest here has been greatly protracted. In the present grave emergency, the Government looks to private industry for cooperation and support and, where practicable, for increased investment of private capital for the immediate strengthening of the national economy and security. In this case, an experienced and successful private utility company is ready, willing and able to proceed under Federal license and regulation with the development and utilization of idle and wasting natural resources at Roanoke Rapids without aid of the Federal Treasury and substantially in harmony with the Army's comprehensive plan. Its proposed project has been approved by the Army Engineers.
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> * * *
>
> "Further delay in the construction of the Roanoke Rapids project would prolong unnecessarily the wastage of the water of the Roanoke River. Such continued wastage could not, it is thought, be justified now in the face of the pending application, the established need for additional power in the area and the general need for increased effort and speed in the development and employment of idle water resources in the interest of the country's economy and safety."

We earnestly urge that development of the Roanoke Rapids power dam should not be further enmeshed in this unreasonably protracted litigation, and that, on the issues sought to be raised, which have their importance only in what Congress may in the future declare to be its wishes, certiorari should be denied.

CONCLUSION

For the foregoing reason it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated April 23, 1952.

Excerpts from Section 169 of the Revised Statutes as amended

There is authorized to be employed in each executive department * * * such number of employees of the various classes recognized by sections 661-663, 664-669, 670-672, 673, and 674 of this title, as may be appropriated for by Congress from year to year * * *. (5 U. S. C. § 43)

Section 189 of the Revised Statutes

No head of a department shall employ attorneys or counsel at the expense of the United States; but when in need of counsel or advice, shall call upon the Department of Justice, the officers of which shall attend to the same. (5 U. S. C. § 49)

Excerpts from the Administrative Expenses Act of 1946

The head of any department, when authorized in an appropriation or other Act, may procure the temporary (not in excess of one year) or intermittent services of experts or consultants * * * by contract, and in such cases such service shall be without regard to the civil-service and classification laws * * *. (5 U. S. C. § 55a)

Excerpts from Section 361 of the Revised Statutes

The officers of the Department of Justice, under the direction of the Attorney General * * * shall, on behalf of the United States, procure the proper evidence for, and conduct, prosecute, or defend all suits and proceedings in the Supreme Court * * * in which the United States, or any officer thereof, as such officer, is a party or may be interested * * *. (5 U. S. C. § 306)

Section 359 of the Revised Statutes

Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so. (5 U. S. C. § 309)

Excerpts from the Act of June 30, 1906, c. 3935; 45 Stat. 54. as amended

The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, * * * which district attorneys may be by law authorized to conduct * * *. (5 U. S. C. § 310)

Excerpts from the Act of April 17, 1930, c. 174; 46 Stat. 170 as amended

Every attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney * * *. (5 U. S. C. § 315)

Excerpts from the Act of June 26, 1946, c. 494; 60 Stat. 312

The legal work of the Department of the Interior shall be performed under the supervision and direction of the Solici-

tor of the Department of the Interior * * *. (5 U. S. C. §483a)

Excerpts from the Judicial Code

(a) Except as otherwise provided by law, it shall be the duty of each United States attorney, within his district, to: * * *

(2) Prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned; * * *

(b) The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party and shall direct all United States attorneys, assistant United States attorneys, and attorneys, appointed under section 503 of this title, in the discharge of their respective duties. (28 U. S. C. §507)